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JAN 25 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington DC 20554

January 25, 2001

Dear Ms. Salas,

Enclosed for late filing in the IB docket No 00-187 is a copy of the Note Verbale submitted by the European Community and its Member States to the US Department of State, which addresses the importance for all WTO members to avoid taking any action that may jeopardize the effective implementation of their GATS commitments, or that could undermine the current negotiation for further liberalization of trade in services.

Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "B. van Barlingen".

Bert van Barlingen  
Counselor  
Head of Trade Section

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1. The Delegation of the European Commission presents its compliments to the Department of State and has the honour to refer to the Applications for consent to Transfer of Control filed by VoiceStream Wireless Corporation ("VoiceStream"), Powertel, Inc. ("Powertel"), and Deutsche Telekom AG, filed at the Federal Communications Commission (FCC) on September 18, 2000, and on which the FCC has solicited comments in IB Docket No. 00-187.
2. The European Community and its Member States welcome the opportunity to comment offered by the FCC and wish to recall the importance that they attach to open telecommunications markets at a global level. They have pursued actively that objective in the past and intend to do so in the future as shown by their recent Communication to the WTO Council for Trade in Services (S/CSS/W/35 dated 22 December 2000).
3. The European Community and its Member States share the view of the United States and the FCC that the conclusion on February 17, 1997 of the negotiations on "Basic Telecommunications", and the subsequent entry into force of the Fourth Protocol to the General Agreement on Trade in Services are an historic achievement. The signatories to this Protocol account for nearly 95 percent of the world telecommunications services' market. It has thus stimulated the growth of the global communications services market and contributed greatly to making the global Information Society a reality.
4. This achievement was made possible as a result of the decision by WTO members – on the basis of the outcome of the negotiations - to make commitments to open their markets to suppliers of all other WTO members, without reserving the right to introduce further conditions on market access. The European Community and its Member States and the United States in particular took active roles during the negotiations, and have shown leadership in terms of the scope of their commitments and of the actions taken since to implement vigorously the commitments made.

8. Indeed, in the Communication from the United States accompanying its Draft Offer (S/NGBT/W/12/Add.3/Rev.1) in the course of the negotiations on basic telecommunications, the United States explained:

The United States offers up to 100% indirect ownership of common carrier radio licenses – *there will be no limits on indirect ownership of such licenses by foreign governments (including government-owned corporations), non-U.S. nationals or non-U.S. corporations or other business entities.* Nor will there be any limits on the nationality of officers or directors of any company holding directly or indirectly a common carrier radio license. *There is a limit on direct ownership, but it is one of form not substance.* A foreign government (including a government-owned corporation), a non-U.S. national or a non-U.S. corporation or other business entity can directly own or control a U.S. holding company, which directly owns or control[s] 100% of a U.S. corporation holding a common carrier radio license.

The Draft Offer, by its terms, stated limitations only as to direct ownership of a common carrier radio license. As indicated above, these provisions remained unaltered in the final US offer – the Schedule of Commitments to which the US is now bound as part of the Fourth Protocol to the General Agreement on Trade in Services.

9. In comments received by the FCC with respect to the VoiceStream/Powertel/Deutsche Telekom applications (Comments of Senator Ernest F. Hollings), the FCC has now been asked to interpret section 310 of the Communications Act of 1934 to prohibit a foreign government (including a state-owned corporation) from owning or controlling a US holding company which itself directly owns or controls a US corporation holding a common carrier radio license. That interpretation is directly contrary to the US Schedule of Commitments, and would impose a restriction on market access not contained in the US commitments. As such, it would violate US commitments under the GATS.
10. The European Community and its Member States believe it essential that all WTO Member Countries avoid taking any action that may jeopardise the effective implementation of their GATS commitments, or that could undermine the current negotiations for further liberalisation of trade in services. Major trading partners, such as the United States and the European Community, bear a special responsibility in this respect. If the FCC were now to adopt an interpretation of US law abrogating a key US commitment, the FCC could irreparably damage the implementation of commitments under the General Agreement on Trade in Services world-wide, as well as jeopardise the negotiations for further liberalisation of trade in services.

11. The European Community and its Member States note that the FCC has also received comments with respect to the VoiceStream/Powertel/Deutsche Telekom applications (Comments of Global TeleSystems, Comments of Novaxess, Comments of QS Communications) that ask the FCC to impose, as a condition of market access, regulatory conditions governing Deutsche Telekom's activities in Germany. These comments in essence seek to reinstate conditional market access for applicants from WTO member countries, as that was previously the rule under the Effective Competitive Opportunities (ECO) test.
12. However, market access cannot be conditioned on the level of commitments in the originating country of the supplier or on the way these commitments are implemented. In that respect, the European Community and its Member States agree with the FCC's statement in its *Foreign Participation Order* (FCC 97-398): "In contrast to [the FCC's] policy that considers the competitive impact of a firm's entry into the US market, a policy of discrimination among carriers based on their WTO commitment alone could be interpreted by other WTO Members as discriminating among 'like' service suppliers based solely on foreign market conditions. This could be perceived as a violation of Article II of the GATS." (¶140) The European Community and its Member States further agree with the FCC's statement in that Order, that "discriminating among foreign applicants based on the extent of the implementation of their commitment could raise serious concerns under GATS." The adoption of such a policy would lead to the undermining of the whole General Agreement on Trade in Services, as indeed, this would breach articles II, XVI and XVII of the GATS.
13. In the *Foreign Participation Order*, the FCC recognised, "The success of the WTO Basic Telecommunications Agreement depends on implementation of the market-opening commitments of our trading partners. The United States must lead the way in prompt, effective implementation of our commitments. If the United States is perceived as failing to implement its commitment, other countries would likely limit implementation of their own commitments." The European Community and its Member States agree that the example set by the United States, the European Community and other countries who all contributed significantly to the successful conclusions of the negotiations on basic telecommunications services in 1997, is critical to the continued effective implementation of their results and to further liberalisation of trade in services.
14. The WTO Agreement on Basic Telecommunications has been extremely valuable to the United States, the European Union, and other WTO members in opening up telecommunications markets to unprecedented levels of competition and growth. In the four years since the agreement was concluded, the value of the global telecommunications

market has increased from nearly \$ 650 billion to nearly \$ 1 trillion in annual sales. The value of the European Union market alone has now grown to an estimated 191 billion Euros (approximately \$ 177.5 billion) in 2000. The EU's commitments in the telecommunications sector give the US (and firms from other WTO members) broad access to this growing market. If the United States, with its well-established telecommunications market and globally competitive companies, takes a protectionist stance toward foreign investment, then other countries, in particular those with less developed markets, may do so as well.

15. The European Community and its Member States reaffirm their commitment to fully implement their own WTO commitments, and to address fully and promptly any concerns that such commitments are not being implemented. The European Community and its Member States remain prepared at any time to discuss with the United States any concerns that the United States may have regarding the implementation of their commitments. However, FCC review of a merger application is not the proper forum for such discussions.
16. The European Community and its Member States reserve their rights under the WTO to challenge any actions by the FCC that are not compatible with the WTO obligations of the United States. The Delegation of the European Commission would be grateful for the views of the Department of State, and requests that this Note Verbale be transmitted to the Federal Communications Commission so that it can be part of the proceedings in this matter and put in the public record.
17. The Delegation of the European Commission avails itself of the opportunity to renew to the Department of State the assurance of its highest consideration.



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5. In that perspective, the European Community and its Member States have serious concerns regarding some comments received by the FCC in response to the VoiceStream/Powertel/Deutsche Telekom applications referred to above. The European Community and its Member States find that these comments urge the FCC to interpret US law in a manner inconsistent with US commitments and obligations under the GATS. Specifically, the FCC has been asked to interpret US law, *inter alia*, to preclude market access through acquisition of controlling, indirect ownership interests by state-owned and -controlled corporations, or to impose, as a condition of market access, regulatory conditions governing Deutsche Telekom's activities in Germany. If the FCC were to adopt either of these requests, this would constitute a clear violation of the US commitments in the WTO and it would affect the interests of European companies that intend to invest in the US. The European Union reserves its right to take any appropriate course of action should the FCC adopt such requests, and would oppose any action that would undermine the US WTO commitments.

6. The Schedule of commitments of the US regarding telecommunications services (GATS/SC/90/Suppl.2 dated 11 April 1997) includes mobile services under the heading "2.C.o. Other, mobile services, Analogue/Digital cellular services and Personal Communications services". This Schedule of commitments reads for these services for Mode 3 (commercial presence) :

in the column on Limitations on National Treatment:

"None"

and, in the column on Limitations on Market Access:

"None, other than

- Ownership of a common carrier radio license:

Indirect: None"

7. Thus, the United States commitments in the WTO as regards telecommunications services expressly allow for an unlimited indirect foreign ownership of radio licenses, and there should not be any market access restriction in the case involved, whether related to state ownership or to any other ownership characteristics of the supplier.